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## Constitutional Law

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the mortgagee. Sound management would, in fact, vitiate the argument that the vessel was unseaworthy and any creditor seeking to recover pre-paid freights would, therefore, have to sue in contract and be forced to settle for a smaller share of the proceeds. Even if the *Morrissey* decision is simply viewed as one of a policy choice between two innocent parties,<sup>50</sup> the absence of the vessel owner's reckless acts would most likely be enough for a court to then favor the ship mortgagee. Therefore, it is submitted that ship mortgagees need not become unduly concerned about the *Morrissey* decision, for the fact situation in itself is unique and affords a possible basis for future distinction. If any principle is to be extracted from this case, it is not particularly a legal one, but simply that investors in the ship mortgage market primarily need to be more selective in their investments, that shipowners primarily need to exercise better financial methods, and that shippers primarily need to be more cautious before agreeing to pre-pay freight charges.

*Joseph A. Murphy*

CONSTITUTIONAL LAW—Congress, by appropriate legislation, may have the power to punish private conspiracies that interfere with fourteenth amendment rights.

*United States v. Guest*, 383 U.S. 745 (1966).

In a Federal indictment growing out of the murder of Negro Educator Lemuel Penn on a Georgia highway, the prosecution alleged a conspiracy by the six defendants to deprive Negro citizens of the free exercise and enjoyment of "the right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated, or managed by or on behalf of the State of Georgia or any subdivision thereof."<sup>1</sup> Such alleged deprivation was said to be in violation of the Equal Protection Clause of the fourteenth amendment;<sup>2</sup> and of 18 U.S.C. § 241, which provides in part:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his not having exercised the

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50. Admiralty can be viewed quite often in this regard. For example, the Supreme Court seems to have decided *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), on this basis. See also, Comment, 9 VILL. L. REV. *supra* note 29.

1. *United States v. Guest*, 383 U.S. 745, 753 (1966). Paragraph two of the indictment.

2. U.S. Const. amend. XIV, § 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*" [Emphasis added.]

same . . . they shall be fined not more than \$5000 or imprisoned not more than 10 years, or both.<sup>3</sup>

The United States District Court dismissed the indictment on the ground that it did not charge an offense under the laws of the United States.<sup>4</sup> The Supreme Court reversed the district court, asserting that 18 U.S.C. § 241 clearly protects those constitutional rights of a citizen arising under the fourteenth amendment; deeming such rights to be "secured" within the meaning of the statute.<sup>5</sup>

Traditionally, the fourteenth amendment has been said to have reference to State action exclusively, and not to action of private individuals.<sup>6</sup> The prohibitions of the amendment were expressly directed at the states, and were thought "not to add anything to the rights of one citizen as against another."<sup>7</sup> The amendment contains an enforcement provision, section 5, whereby Congress is authorized to enact "appropriate legislation" for the purpose of enforcing the provisions of the amendment.<sup>8</sup> Despite this express grant, it was thought that Congress was without constitutional power to enact laws punishing *persons* for conspiring to deprive others of, for example, the equal protection of state laws.<sup>9</sup> Rather, the "power" offered by section 5 was considered dormant in the absence of the following circumstances:

. . . [U]ntil some State law has been passed; or some State action, through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity; for the prohibitions of the amendment are against State laws and acts done under State authority.<sup>10</sup>

Historically, then, the effect of the fourteenth amendment has been to merely place a curb on discriminatory "state action"—it has not been

3. This statute, upon which the government relied, originated as Section 6 of the Act of May 31, 1870, 16 Stat. 140. It subsequently and successively became known as Section 5508 of the Revised Statutes of 1874-1878, Section 19 of the Criminal Code of 1909, 18 U.S.C.A. § 51, 1926 edition; and is presently 18 U.S.C.A. § 241, 1948 edition.

4. *United States v. Guest*, 246 F. Supp. 475 (M.D. Ga. 1964).

5. *United States v. Price*, 383 U.S. 787, 800 (1966), where the language of section 241 was said to embrace ". . . all of the rights and privileges secured to citizens by all of the Constitution and all of the laws of the United States. There is no indication in the language that the sweep of the section is confined to rights that are conferred by or 'flow from' the Federal Government, as distinguished from those secured or confirmed or guaranteed by the Constitution."

6. *Virginia v. Rives*, 100 U.S. 313 (1879).

7. *United States v. Cruikshank*, 92 U.S. 542, 554 (1875).

8. U.S. Const. amend. XIV, § 5: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

9. See *United States v. Harris*, 106 U.S. 629 (1882).

10. *Civil Rights Cases*, 109 U.S. 3, 13 (1883).

interpreted as a positive command to the states to pass laws against private discrimination.

According to the indictment in *Guest*, one of the means of accomplishing the object of the conspiracy was “. . . by causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts. . . .”<sup>11</sup> In writing the opinion of the Court, Mr. Justice Stewart construed this allegation as being broad enough to cover a charge of active connivance by agents of the State of Georgia in furthering the conspiracy. Stating “. . . that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority,”<sup>12</sup> the Court reasoned that state agents, or persons acting under color of state authority, may have been among those who “caused the arrest of Negroes by means of false reports”—or engaged in other conduct amounting to official discrimination. The indictment was upheld as sufficiently alleging “state participation,” thereby bringing the conspiracy within the ambit of the fourteenth amendment. The Court did not feel required to determine what minimum state “involvement” would have to be proved at trial in order to convict the alleged conspirators under section 241. The opinion went no further than to say that the involvement of the state need not be “exclusive or direct.”<sup>13</sup>

Mr. Justice Brennan, with whom the Chief Justice and Justice Douglas joined, did not agree with the Court’s limiting interpretation—that the conspiracy indictment could be upheld because of the “allegation” of state participation.<sup>14</sup> Concurring in the result, they focused on the power of Congress under section 5 of the fourteenth amendment—the power to enforce the provisions of the amendment—under which they would treat section 241 as an example of “appropriate legislation” seeking to

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11. The indictment, found in footnote 1 of Justice Stewart’s opinion, 383 U.S. 745, 747 (1966), filed on October 16, 1964, included the following allegation:

It was a part of the plan and purpose of the conspiracy that its objects be achieved by various means, including the following:

1. By shooting Negroes;
2. By beating Negroes;
3. By killing Negroes;
4. By damaging and destroying property of Negroes;
5. By pursuing Negroes in automobiles and threatening them with guns;
6. By making telephone calls to Negroes to threaten their lives, property, and persons, and by making such threats in person;
7. By going in disguise on the highway and on the premises of other persons;
8. By causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts; and
9. By burning crosses at night in public view.

All in violation of Section 241, Title 18, United States Code.

12. 383 U.S. 745, 755 (1966).

13. *Ibid.*

14. 383 U.S. 745, 774 (1966).

enforce a citizen's right to the equal utilization of state facilities. Such a right was said to be created by and derived from the fourteenth amendment:

The Fourteenth Amendment commands the State to provide members of all races with equal access to the public facilities it owns or manages, and the right of a citizen to use those facilities without discrimination on the basis of race is a basic corollary of this command.<sup>15</sup>

A conspiracy against such a right, therefore, would be a conspiracy against a right "secured . . . by the Constitution" within the meaning of section 241—regardless of any state participation in the conspiracy.

Three other Justices,<sup>16</sup> in a separate concurring opinion also thought it appropriate to consider, in this case, whether Congress, under section 5 of the fourteenth amendment, may legislate to prevent *private* denials of a citizen's fourteenth amendment rights, ". . . such as the right to utilize public facilities."<sup>17</sup> In answer to this question they stated that "there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights."<sup>18</sup>

If a state will not enforce laws by which private individuals shall be prevented from contravening the rights of a citizen under the fourteenth amendment, then it may be the duty of the United States Government, as authorized by section 5 of that amendment, to do so.<sup>19</sup> The language of the fourteenth amendment is prohibitory; "but every prohibition implies the existence of rights."<sup>20</sup> In saying that a state shall not "deny" to any person within its jurisdiction the equal protection of the law, can it not be said that a state is making just such a denial when it fails, by acts of omission, to prevent its own citizens from depriving their fellow-citizens of rights derived from the fourteenth amendment.

In *Guest*, then, a majority of the Supreme Court<sup>21</sup> have expressed the view that section 5 of the fourteenth amendment allows the United States Government, by its own laws and by its own courts, to go into the

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15. *Id.* at 780.

16. Mr. Justice Clark, with Justices Black and Fortas joining.

17. 383 U.S. 745, 762 (1966).

18. *Ibid.*

19. See the Appendix in *United States v. Price*, 383 U.S. 787, 807 (1966), containing the remarks of Senator Pool of North Carolina on sponsoring that section of the Enforcement Act of 1870 which is today known as 18 U.S.C. § 241.

20. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879).

21. The majority consists of the Justices joining Clark's opinion and the Justices joining Brennan's opinion. The opinion of Mr. Justice Stewart construes section 241 as applied here to require proof of active participation by state officers in the alleged conspiracy.

states for the purpose of vitalizing the amendment there—when the states have not, by positive action, taken steps to protect those “rights” of a citizen which are derived from the fourteenth amendment. This case finds “the equal utilization of state facilities” to be among such derived rights. What other positive rights may be so derived remains to be seen. The concurring opinions suggest that section 5 may now be interpreted as a grant of positive power authorizing Congress to implement the fourteenth amendment by fashioning remedies designed to achieve civil and political equality within all the states.

The need to find “state action” may be a loosening hobble on congressional authority.<sup>22</sup> In the future, federal law may be able to reach private individuals who attempt to deprive a citizen of his fourteenth amendment rights, although the role of the state be merely one of compliance or “inaction.” Such an interpretation would seem to seriously threaten the existence of such problem areas as *de facto* segregated schools and private-housing discrimination.

*Thomas Patrick Ruane*

**CONSTITUTIONAL LAW**—Initiative measure permitting discrimination in the sale or rental of private housing held to be “state action” in violation of the equal protection clause of the fourteenth amendment.

*Mulkey v. Reitman*, 413 P.2d 825 (1966), *cert. granted*, — U.S. — (1966) (No. 483).

Plaintiff Negroes sought a restraining order under sections 51 and 52 of the California Civil Code (the Unruh Civil Rights Act)<sup>1</sup> to prevent the defendants from discriminating according to race in the rental of an apart-

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22. See, *Time*, Sept. 23, 1966, p. 76.

1. Civil Code, section 51:

All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Civil Code, section 52:

Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of color, race, religion, ancestry, or national origin, contrary to the provisions of section 51 of this code, is liable for each and every such offense for the actual damages, and two hundred fifty dollars (\$250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this code.

Justice Peek, writing for the majority in *Mulkey v. Reitman*, 413 P.2d 825 (1966), *cert. granted*, — U.S. — (1966) (No. 483), states at 829, “On its face, this measure [Civ. Code §§ 51-52] encompassed the activities of real estate brokers and all businesses selling or leasing residential housing.”